STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Bandstra, C.J., and Whitbeck and Owens, J.J.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs Supreme Court No.**120630**

RICHARD J. MENDOZA,
Defendant-Appellee,
/

Wayne County Circuit Court No. 97-010292
Court of Appeals No. 220272

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

MICHAEL E. DUGGAN
Wayne County Prosecuting Attorney

Timothy A. Baughman
Chief of Research, Training, and Appeals

Deborah K. Blair (P 49663)
Attorney for Plaintiff-Appellant
Assistant Prosecuting Attorney
Frank Murphy Hall of Justice
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226-2302
Phone: (313) 833-2888

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Summary of Argument

This court has held that the only sort of "lesser-included" offense that exists is one that is a subset of the elements of the greater offense. Until the creation of "cognate-included" offenses the law had been that manslaughter in both of its forms – both voluntary and involuntary – were included offenses under a formulation of included offenses that only admitted of what came to be termed "necessarily-included" offenses. After the creation of cognate offenses, manslaughter was held to be a cognate rather than a necessarily-included offense of murder. In making this change, the court erred, for, properly understood, manslaughter is a subset of the elements of murder, whether the form of manslaughter be voluntary or involuntary.

This court has also now held that one is entitled to instruction on an included offense only if that offense is supported by a rational view of the evidence. Here, the defendant did not claim, in asking for an involuntary manslaughter instruction, that he acted with gross negligence, but rather, in his police statement – as his theory at trial was that he was outside in an automobile – he claimed he was simply coming to the aid of someone else, and that when he struck the arm of the individual holding the gun that person pulled the trigger. Defendant claimed the shooting was an accident -- or that the other person intentionally fired at this time – not that it was the result of any negligence at all on his part. The evidence does not support an involuntary manslaughter instruction in his case.

Statement of Jurisdiction And Material Proceedings

The People appeal from the unpublished per curiam opinion of the Court of Appeals, released on October 9, 2001. The Court of Appeals decision in this matter reversed a Wayne County Circuit Court conviction for second degree murder. The People sought leave to appeal in this Court on December 18, 2001, and on October 22, 2002, the Court granted the People's application for leave to appeal.

MCR 7.301(A) provides the basis for jurisdiction over this appeal by leave granted.

Statement of Question Presented

I.

Properly understood, the elements of manslaughter are a subset of the elements of murder. Under *People v Cornell*, an instruction on a lesser included offense is required only when supported by a rational view of the evidence. Should *People v Van Wyck*, which held that the elements of manslaughter are not a subset of the elements of murder, be overruled, but Defendant's conviction affirmed because a manslaughter instruction was not supported by the evidence?

The People answer: "Yes."
Defendant answers: "No."
Trial court did not answer.
Court of Appeals answered: "No."

Statement of Material Proceedings And Facts

Defendant was convicted by a jury of second degree murder and possession of a firearm during the commission of a felony. Defendant was sentenced to a term of twenty-five to forty-five years in prison for the murder conviction, to be preceded by the mandatory two years for felony firearm. The Court of Appeals reversed Defendant's conviction because the jury was not instructed on the theory of involuntary manslaughter. The People filed a motion for rehearing which was denied. The People sought leave to appeal to this Court which was granted on October 22, 2002.

Facts of the Trial

Thurman Lee Chillers testified that on October 30, 1997, he lived at 19960 Annott in the City of Detroit with his uncle, William Stockdale, the deceased.[1] Chillers and Stockdale sold marijuana from their house but Chillers denied that they sold crack.[2] On the day of the offense, Chillers was high from smoking marijuana.[3] Defendant came to the door and asked to buy an ounce of weed. Chillers recognized Defendant from the day before when Defendant had come to buy marijuana with someone in a grey car. Stockdale came out of his bedroom and told Defendant that ounce of weed would cost $160.00.[4] Defendant said that he had to go back to his

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[1] 23a.

[2] 103a.

[3] 99a.

[4] 104a.

car to get the rest of the money from his friend.[5] Chillers was able to see Defendant Tims sitting outside in a grey Chevrolet Lumina.[6]

Defendant walked out the front door and came back in the house with Tims following behind. Defendant held a black automatic handgun[7] when he came through the door.[8] Stockdale headed for the bedroom and co-defendant Tims pulled out a gun. Defendant told Tims to "shoot him."[9] Tims pointed the gun at Chillers then at Stockdale and then back to Chillers. Stockdale rushed at Defendant, grabbed the gun, and swung it downward. Chillers ran away through the kitchen.[10]

Chillers said that he later came back in the house and touched one gun that was in his uncle's bedroom, a .357 handgun.[11] A gun powder test performed on his hands by the police was positive.[12] Chillers picked Defendant out of a corporal line-up.[13]

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[5] 40a.

[6] 41a.

[7] 49a.

[8] 105a.

[9] 48a.

[10] 59a.

[11] 95a.

[12] 100a.

[13] 96a.

Jess Darryl Fuson was a neighbor of the deceased, William Stockdale.[14] On October 29, 1997, Fuson noticed a grey Chevrolet Lumina parked outside the deceased's house with both defendants seated inside it smoking a joint.[15] Defendant was in the drivers seat and co-defendant Tims was in the passenger seat.[16] On October 30, 1997, after 1 p.m., Fuson saw Tims walk-up to the porch of 19960 Annott.[17] Defendant got out of the car and went into the house. About two or three minutes later, Fuson heard glass breaking. Then he heard one gunshot. He saw both Defendants being thrown out of the house by Stockdale. They landed on the cement walkway. Tims ran back up on the porch, opened the door, and started shooting the house up with bullets from a black automatic handgun.[18] Meanwhile, Defendant ran to the side of the house and then back to the car as gunshots were coming from the house.[19] Fuson heard shots coming out of the bedroom window. At this point, Defendant was already in the car. Tims ran toward the passenger door, with his back to the house. Fuson heard more gunshots and saw Tims spin around and land in the passengers side of the car. The car sped-off with Tims shooting at the

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[14] 108a.

[15] 109a.

[16] 112a.

[17] 113a-114a .

[18] 115a-117a.

[19] 118a-119a.

house.[20] Fuson heard a total of six or seven shots after the initial gun shot.[21] Fuson later picked both Defendants out of separate corporal line-ups.[22]

Voizell Jennings testified that he was employed in the Detroit Police Department Homicide Section and took a statement from the Defendant on November 1, 1997.[23] The statement read as follows:

> Q.: What can you tell me about yourself being shot?
>
> A.: I was at a gas station on Seven Mile near Hoover when Ivan pulled up in a grey newer model car asked me did I want some bud. Ivan asked me did I have half on it. I said, yes. I then got into the car with Ivan. Ivan stopped by one house, then he went to the bud house. When we got to the house, Ivan stayed in the car and I went up to the house. When I got to the front door, there was a big guy coming out and motioned for me just to go on in. The guy that let me in continued talking to a big dark-skinned guy with a deep voice. Another guy, kind of frail, sitting in a love seat asked me how many I needed. I responded by saying, just one back. That's when Ivan came to the door. Ivan started talking to the guy with the deep voice. The guy that let me in then left. I started to get my stuff from the frail guy. While I'm getting my stuff, I heard some tussling. I took back and Ivan was tussling with the big guy with the deep voice. They were tussling over a handgun with a dark barrel. While they were tussling, I heard approximately two shots. They then fell into a corner over a chair. I then heard the frail guy holler. He had pulled out a shiny revolver and pointed it at Ivan and the guy he was tussling with. I then tried to knock the gun away from the frail guy. As I was attempting to knock the gun away from the frail guy, he (frail guy) pulled the trigger. I then tried to run but I tripped over Ivan or the guy he was tussling with feet. I then got up and ran out the house and I started feeling pain

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[20] 120a.

[21] 121a-122a..

[22] 123a.

[23] 125a.

and I hearing shots. I looked back and the shots are coming from a bedroom window. I then see Ivan coming out the house. By this time I was bent over and I grabbed and Ivan grabbed me and asked me was I all right. I told him no. I'm hurt. Ivan then helped to the car and drove off. I don't remember too much after that.

Q. Describe Ivan.

A. Black male, twenty-six, 5'8", light complected, heavy build. Ivan's last name is either Burlington or Tims. He goes by the nickname of E.

Q. Describe the guy Ivan was tussling with.

A. Black male, twenty-six, 5'10" or 5'11", dark complected, muscular build, no shirt.

Q. Describe the frail guy.

A. Black male, twenty five to twenty-six, 5'9", slim or frail build, medium brown complected, armed with a silver revolver.

Q. Describe the guy that let you in the house.

A. Black male, thirty, 6'2", medium to dark complected, three hundred pounds, wearing a black and white jersey.

Q. Did you or Ivan have a gun?

A. I didn't have a gun. I don't know what Ivan had.

Q. Where does Ivan stay?

A. I don't know.

Q. Did you pay the frail guy for the bag of weed?

A. Yes. I paid him ten dollars.

Q. Do you know black?

A. No. The house I went to before the bud house was Black house, but I stayed in the car.

Q. Where is the bud house at?

A. It runs the same way as Hoover near State Fair Street between Hoover and Schoenherr.

Q. Where is black's house?

A. All I know is that it's a few streets from the bud house.[24]

Sergeant Jennings presided over Defendant Mendoza's line-up. When Thurman Chillers identified Defendant he said: "he had the gun to my uncle's head. He the one my uncle tussled with."[25]

Jonwana Harper testified that she was Ivan Tim's girlfriend. On October 30, 1997, Defendant and Tims left her house in her car and they did not return.[26]

Police Officer Vincent Crockett testified that he was the first police officer on the scene and he spoke to two witnesses who laid out what happened that day.[27] He talked to Thurman Chillers and one other person and was given a description of two suspects.[28]

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[24] 126a-132a.

[25] 200a.

[26] 134a.

[27] 135a.

[28] 136a.

Detroit Police Officer Willie Little testified that at 1:30 p.m. he went to 19960 Annott Street in Detroit.[29] He spoke to a witness that gave a description of two suspects.[30] Suspect number one was a black male in his thirties, 6'2", two hundred and fifty pounds, wearing a black jacket with orange and green on it and glasses. Suspect number two was a black male in his thirties, 5'10", a hundred and ninety-five pounds, and blue sweatshirt.[31] He conveyed Thurman Chillers to homicide section for questioning.[32]

Detroit Police Officer James Vance Diguiseppe testified that on October 30, 1997, at 1:35 p.m. he went to 19960 Annott Street in the City of Detroit.[33] He saw William Stockdale on the front lawn of that address and determined that Stockdale had been shot. He held the scene and notified homicide and EMS.[34] He was given a description of two perpetrators. The first description was of a black male, approximately thirty years-old, 6'2", two hundred and fifty pounds with black hair, a black jacket with orange and green. The second description was of a black male, thirty years-old, 5'10", one hundred and ninety-five pounds, wearing a blue sweatshirt.[35]

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[29] 136a.

[30] 137a.

[31] 138a.

[32] 139a.

[33] 140a.

[34] 140a.

[35] 141a.

Detroit Police Officer Steven Yackimovich testified that he was an evidence technician with the Detroit Police Department.[36] He prepared a sketch of the scene at 19960 Annott.[37] He also took photographs of the scene.[38] In preparing the sketch he found a handgun on the floor of the northwest bedroom.[39] There was a rifle and a box of ammo under the bed.[40] There was loose ammo and marijuana on top of a dresser in the bedroom.[41] There was marijuana found throughout the house.[42] A magazine with live nine millimeter cartridges was found near the front door on the porch.[43] On direct examination he testified that there were no broken windows in the house, but on cross-examination it was revealed that his report indicated that the window north of the porch was broken with broken glass on the ground below.[44] A spent nine millimeter RNP bullet casing was found in the living room in the southwest corner area.[45] There was a

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[36] 142a.

[37] 144a.

[38] 143a.

[39] 145a.

[40] 147a-148a.

[41] 149a.

[42] 151a.

[43] 154a.

[44] 155a; 165a.

[45] 156a.

suspected bullet hole in the west wall fifty-four inches up and twenty-one inches south of the front door.[46]

He was directed to go to St. John's Hospital to photograph a Chevrolet Lumina with license plate, NWR-729. He collected clothing and property, and performed a gunshot residue test on Defendant.[47] He also performed a gunshot residue test on Thurman Chillers.[48]

Sergeant Charles McDonald of the Detroit Police Department testified that he was an evidence technician. On October 30, 1997, he photographed, searched, and dusted for prints, a grey 1995 Chevrolet Lumina in response to a request by Officer Yackimovich.[49] He took a photograph of the trunk which showed a baby stroller and two handguns underneath it.[50] One of the weapons was a blue steel automatic from an unknown manufacturer. The serial number was drilled out. The weapon had no clip and had suspected blood on it.[51] The other gun was a nickel-plated revolver.[52] There were three spent casings and two live casings retrieved from the revolver.[53] The vehicle had minor damage in the passenger front corner and scrapes on the rear bumper. There was a light coat of dirt on the vehicle. There was a blood smear on the top deck

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[46] 157a.

[47] 160a.

[48] 163a.

[49] 166a.

[50] 167a-168a.

[51] 168a.

[52] 169a-170a.

[53] 170a.

lid. There was blood on the front of the rear door on the driver's side and blood on the inside door post of the driver's side. The keys were in the ignition.[54]

Detroit Police Sergeant Kenneth Balinski testified that on October 30, 1997 at about 1:25 p.m. he went to 19960 Annott Street in the City of Detroit to back-up other units in response to a shooting.[55] He went to St. John's Hospital to investigate a vehicle connected to the shooting. He turned off the car's flashers and then watched the car until the evidence technicians arrived.[56]

Dr. Carl Schmidt of the Wayne County Medical Examiner's Office testified to William Stockdale's manner and cause of death.[57] The deceased was shot twice, once in the leg and once in the chest. Cause of death was a gun shot wound to the chest.[58] Manner of death was homicide. There was no evidence of close range firing on the skin but if there was clothing between the gun and the skin, soot would be deposited on the clothing and there would be no remnant on the skin.[59]

Susan Anne Greenspoon testified that she was a senior forensic serologist for the Detroit Police Department.[60] She received evidence from Investigator Roscoe Thomas of the Homicide

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[54] 172a-173a.

[55] 174a.

[56] 176a.

[57] 178a.

[58] 179a.

[59] 181a-182a.

[60] 183a.

Section of the Detroit Police Department.[61] Included in that evidence was a gunshot residue test kit for Thurman Chillers, a gunshot residue test kit for Defendant, a gunshot residue kit for Ivan Tims, and a tube of blood from William Stockdale.[62]

William Steiner testified that he was a forensic chemist working at the Detroit Police Department crime laboratory, trace evidence unit.[63] He was qualified as an expert in forensic chemistry. He took the three gunshot residue test kits and analyzed them.[64] There was gunshot residue detected on the web area of the right hand of Thurman Chillers.[65] That meant that either he had fired a weapon or had picked-up and handled a recently fired weapon or had been standing in very close proximity to somebody else who had fired a weapon.[66] In Defendant Mendoza's kit four areas were sampled. The web areas of the right and left hand, the forehead and face, the coat sleeves and upper chest area of the coat he was wearing. The test results for Defendant indicated that the particles were indicative or consistent with gunshot residue on the right web sample, but the quantity and quality of particles was insufficient for a positive result.[67]

Detroit Police Sergeant Dale Johnston testified that on December 3, 1997, he was employed in the forensic science division. He was qualified as an expert in the field of firearms

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[61] 183a.

[62] 184a.

[63] 185a.

[64] 185a.

[65] 186a.

[66] 186a.

[67] 187a.

identification.[68] He tested the 9 mm Norinco semi-automatic pistol previously admitted into evidence. The four fired cartridge cases on People's exhibit 44 were fired from this gun. He tested the Dan Wesson .357 Magnum revolver (People's exhibit 34). No bullets were found to match this gun.[69] He also tested a Clerke .22 caliber revolver.[70] People's exhibits 49, 48 (casings), and 53 (spent bullet) were identified as being fired from this weapon.[71]

There was a stipulation that if Detroit Police Officer Susan Byham had been called to testify she would have testified that on October 30, 1997, at about 1:25 p.m. she was called to St. John's Hospital where she was instructed to watch a 1995 Chevrolet Lumina, license plate 98 Michigan NWP 729 and that while there she observed blood on the driver's side near the door handle.[72]

The defense called Detroit Police Homicide Investigator Lampton Johnson.[73] He testified that he typed a report that said that on October 30, 1997, a canvas bag filled with baggies filled with suspected cocaine was found on the couch in the living room of 19960 Annott.[74] He

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[68] 189a.

[69] 195a.

[70] 196a.

[71] 198a.

[72] 201a.

[73] 202a.

[74] 203a.

did not remember actually seeing a bag full of cocaine and he did not make a PCR on it which is the normal procedure when finding narcotics.[75]

The Defendant's medical records from St. John Hospital were entered into evidence as Defense exhibit 8 without objection.[76]

Detroit Police Sergeant Felix Kirk testified that on October 30, 1997, he interviewed Thurman Chillers.[77] Chillers indicated in his statement that there were two perpetrators, one was described as being a black male, in his early 20's, around five feet ten inches tall, wearing a dark colored baseball cap, with a medium build, light skin, and a big dark colored coat, holding a dark 9 millimeter or .45 automatic.[78] The second perpetrator was described as being a black male, in his early 20's, six feet one inches tall, slender build, and brown skin, holding a chrome .38 caliber revolver.[79]

The defense rested. Jury instructions were discussed. Both sides gave closing arguments. Defendant was found guilty of second degree murder in violation of MCL 750.317, and felony firearm in violation of MCL 750.227b. Defendant was sentenced to mandatory consecutive two years for the felony firearm offense and twenty-five to forty-five years imprisonment for second degree murder.[80]

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[75] 204a-207a.

[76] 207a.

[77] 210a.

[78] 212a.

[79] 211a.

[80] 255a.

Argument

I. Properly understood, the elements of manslaughter are a subset of the elements of murder. Under *People v Cornell*, an instruction on an included offense so defined is required only when supported by a rational view of the evidence. *People v Van Wyck*, holding that the elements of manslaughter are not a subset of the elements of murder, should be overruled, but the conviction here affirmed because a manslaughter instruction was not supported by the evidence.

"The first step to wisdom is calling a thing by its right name."[81]

A. The Van Wyck Aberration

Shortly after Michigan law was fundamentally altered by the invention of "cognate" included offenses, and the concomitant alteration of the rule of entitlement to lesser-included offense instructions to one making the instructions mandatory on request in the case of "necessarily"-included offenses[82] – that is, those that previously had been the only offenses recognized as included at all – whether an instruction on manslaughter must thus be given on request, without any review of whether the instruction is supported by a rational view of the evidence, came before the Court of Appeals.[83] Applying what is now often termed the "subset" analysis of determining whether an offense is an included offense of another,[84] that analysis asking whether the proposed lesser-included offense is a subset of the elements of the greater

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[81] See among others, *Roulette v City of Seattle*, 78 F3d 1425, 1426 (CA 9, 1996)(Kozinski, J.).

[82] See *People v Chamblis*, 395 Mich 408 (1975) *and People v Jones*, 395 Mich 379 (1975), now overruled.

[83] *People v Van Wyck*, 72 Mich App 101 (1976).

[84] "A crime is necessarily included within a greater crime if all of its elements are elements of the greater." *Van Wyck*, at 104.

offense, the court concluded that manslaughter is a "necessarily"-included offense under the *Jones/Chamblis* distinction of cognate- and necessarily-included offenses, so that failure to give the instruction on request was reversible error. The panel's reasoning was impeccable:

> Voluntary manslaughter is the unlawful killing of another without malice express or implied....Although the crime of voluntary manslaughter requires that the act had been committed under great provocation, provocation is not an element of that crime in the true sense. Rather, it is the factor which mitigates what would otherwise have been murder. It is the means by which a showing of malice is rebutted. Defined thusly, it is clear that voluntary manslaughter is a necessarily included offense within the crime of murder.[85]

This result was troubling, for it placed the prosecution in the position of having to prove a negative – the absence of adequate provocation – in cases where no evidence raised the issue of mitigation, an entirely ahistorical proposition.

On the People's application for leave, this court issued a per curium opinion in lieu of granting leave to appeal. The court concluded, without reference to prior cases on the point, that voluntary manslaughter is not a necessarily-included offense of murder, but qualified as a lesser-included offense under the newly created "cognate" rubric, by reasoning that is entirely conclusory:

> The absence of mitigating circumstances need not be established in order to convict one of first- or second-degree murder. Consequently, it cannot be said that voluntary manslaughter is a necessarily included offense within the crime of murder; it is

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[85] *Van Wyck*, at 104-105. Confirmed on rehearing, see *People v Van Wyck (On Rehearing)*, 76 Mich App 17 (1977).

> incorrect to state that it is impossible to commit first- or second-degree murder without having first committed manslaughter.[86]

The court was saying, implicitly, that voluntary manslaughter[87] required proof of an element that was not required for first- or second- degree murder; namely, the *presence* of mitigating circumstances. By this "logic" the court wiped away over a century of jurisprudence with a collective flick of its wrist – and without taking notice that it was so doing – and expressed a view of the distinction between manslaughter and murder that is fundamentally flawed.[88]

(1) Prior jurisprudence

Before the decision in *Van Wyck* – at times when the only sort of included offense recognized was that which came to be known after *Chamblis/Jones* as a necessarily-included offense – manslaughter was well understood to be an included offense of murder in this state, and throughout the nation. In 1861 this Court stated that it was a "general rule of criminal law" that a "jury may acquit of the principal charge, and find the prisoner guilty of an offense of lesser

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[86] *People v Van Wyck*, 402 Mich 266, 269 (1978). Induced by the complexity of murder/malice, with its so-called "negative elements," the court fell into error by failing to take the approach urged by Judge Moylan with his characteristic deftness: to understand the distinction between manslaughter and murder, one must "go down to manslaughter, not up to murder." Moylan, "A Brief History of Criminal Homicide and Its Exponential Proliferation," MD-CLE 12 (2002).

[87] And it has also been held that involuntary manslaughter is a cognate-included offense of murder. See e.g. *People v West*, 408 Mich 332 (1980); *People v Beach*, 429 Mich 450 (1988).

[88] The People believe that the court was, in a very real sense, forced to this position. It cannot be gainsaid that an instruction on request on voluntary manslaughter in every murder case, without looking to whether there is any evidence of adequate provocation, is absurd. But if voluntary manslaughter were a necessarily-included offense of murder, given the court's new entitlement rule of necessarily-included offenses – that they be given on request – this absurd result would obtain. It could be avoided, however, by calling voluntary manslaughter a cognate-included offense, which, under the court's new lesser-included offense jurisprudence, required a view of the evidence for entitlement to an instruction.

grade, *if contained within it.*"[89] The rule thus has a common-law origin not unique to Michigan. But the rule became embodied in statute. In *Hanna* v *People*,[90] the defendant was charged with assault with intent to murder and sought an "all or nothing" verdict, but the trial judge, upon the request of the prosecution, instructed also on assault and battery, and the jury convicted of this offense. On defendant's appeal this court observed that the "general rule at common law *was*, that when an indictment charged an offense which *included within it another less offense or one of a lower degree*, the defendant, though acquitted of the higher offense, might be convicted of the less," subject to the qualification at the common law that in an indictment for a felony the defendant "could not be convicted of a misdemeanor."[91] The Court expressed the opinion that the common-law reasons for this restriction on the common-law lesser-included offense rule had ceased to exist, so that the restriction would cease as a matter of common-law modification even if "we had no statute upon the subject."[92] But to so hold was unnecessary, wrote Justice Christiancy, for the matter *was* governed by statute,[93] the statute of that day reading identically to the current statute.[94]

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[89] *People* v *McDonald*, 9 Mich 150, 152 (1861) (emphasis supplied).

[90] *Hanna* v *People*, 19 Mich 315 (1869)

[91] 19 Mich at 318.

[92] 19 Mich at 320.

[93] Comp L § 5.952.

[94] MCL § 767.32(1).

Justice Christiancy, joined by the other justices,[95] construed the language of the statute regarding an offense "consisting of different degrees" as *not* intended by the legislature to be a limitation of the statute only to offenses divided formally into degrees, for if the statute were so confined, then it would apply "only to the single case of an indictment for murder in the first degree, and *would not even include manslaughter as a lower degree of the offense*...."[96] But this was nonsensical, said the court, for "no one can doubt that without this provision, the common-law rule would, under the statute, *dividing murder into degrees, have authorized a conviction not only for murder in the second degree, but for manslaughter also*, under an indictment for murder in the first degree, all these offenses being felonies *included in the charge*." A construction limiting included offenses to offenses divided formally into degree was thus inadmissible, the statute being declaratory of the common-law rule,[97] and a construction limiting it to those offenses formally divided into degrees meaning that it had "no purpose or object," a result the court found, "as a matter of proper statutory construction," "inadmissible, if the provision will admit of any other."[98]

At least in part, then, because it was well-established under the common-law rule for instruction on included offenses that in a prosecution for first-degree murder that rule would "have authorized a conviction not only for murder in the second degree, but for manslaughter

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[95] Michigan's celebrated "big four" of Cooley, Christiancy, Campbell, and Graves.

[96] 19 Mich at 320 (emphasis supplied).

[97] 19 Mich at 321 (emphasis supplied).

[98] 19 Mich at 320-321.

also," and because the statute was but declaratory of the common law, the statute was read as applying to offenses other than those formally divided into degrees.

That manslaughter was an included offense under a definition that required that the lesser offense be a subset of elements of the greater offense was the law and without controversy in Michigan jurisprudence before *Jones/Chamblis* and *Van Wyck* –indeed, that there could be a contrary view seems to have been virtually unthinkable. The court repeatedly stated that manslaughter was included within murder as an unassailable, indeed, unquestioned, point of law. As early as 1861 the court said that "It is a general rule of criminal law, that a jury may acquit of the principal charge, and find the prisoner guilty of an offense of lesser grade, if contained within it. Thus, upon an indictment for murder, the jury may find a verdict of manslaughter only."[99] Many other cases confirm the point.[100] In *People v Milhelm*,[101] for example, cited in this court's order granting leave to appeal, the defendant was charged with murdering her husband, and the

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[99] *People v McDonald*, 9 Mich 150 (1861). See also *Hanna v People, supra.*

[100] See e.g. *People v Adams*, 52 Mich 24 (1883); *People v Sessions*, 58 Mich 594 (1888)("Manslaughter is included in murder, and a count of manslaughter, in an information of murder, where the defendant has had an examination for murder before a justice of the peace, is good, under How.Ann.St. § 9555, providing that 'no information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor before a justice of the peace...'"); *People v McArron*, 121 Mich 1 (1899)("...as is frequently said, that this charge of murder included the lesser offense" [of manslaughter]); *People v Treichel*, 229 Mich 303, 308 (1922) ("This information charged murder in the first and second degrees, and this was inclusive of manslaughter. The evidence left it open for the jury to find defendants guilty of manslaughter"); *People v Andrus*, 331 Mich 535, 546 (1951)("the general rule [is] that where there is testimony from which the jury might find the absence of such a felonious intent as is necessary to constitute murder, an instruction that they might convict of manslaughter should be given"); *People v Van Camp*, 356 Mich 593 (1959).

[101] *People v Milhelm*, 350 Mich 497 (1957).

jury was instructed on first- and second-degree murder, and also manslaughter, as included offenses, and convicted of manslaughter. The claim on appeal was not that manslaughter was not an included offense of murder, but that no evidence supported the instruction. Stating the accepted rule that "Our code of criminal procedure requires the court to charge in relation to lesser degrees of an offense where there is evidence which would tend to support conviction of a lesser degree," the court concluded that the manslaughter instruction was supported by the evidence.[102]

Van Wyck, then, in finding manslaughter not to be a "necessarily"-included offense of murder, when it had repeatedly and consistently been found to be an included offense of murder throughout our jurisprudential history before there was any *other* kind of included offense than a "necessarily"-included offense, is an aberration, and should be abandoned, the absurdity of instruction on it even without evidence of mitigation in the case having been remedied by this court's restoration of a rational entitlement rule in *People v Cornell*.[103]

(2) Other jurisdictions

Those jurisdictions that consider as lesser-included offenses only those that are subsets of the elements of the greater offense – which is the overwhelming majority of the country – consider manslaughter, in both of its forms, both voluntary and involuntary, an included offense

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[102] And see *People v Rogulski*, 181 Mich 481 (1914)(instruction and conviction on involuntary manslaughter in murder prosecution proper). See also *People v Hanttula*, 324 Mich 560 (1949).

[103] *People v Cornell*, 466 Mich 335 (2002).

of murder. For example, *Schmuck v United States,*[104] the case laying to rest any notion that "cognate" offenses exist in the federal system, cites *Stevenson v United States*[105] with approval. There the Court had held that the refusal to give a voluntary manslaughter instruction on request was error where the instruction was supported by the evidence. This has uniformly been the holding in the federal cases.[106] Other "subset" jurisdictions hold likewise.[107]

(3) Manslaughter as a subset of the elements of murder: deconstructing "malice"

(a) Voluntary manslaughter

Consideration of manslaughter, in both of its forms, as an included offense of the "subset" sort of murder – a "necessarily"-included offense" – is conceptually difficult, but only because murder is a complex crime. Difficulties arise principally because murder is a killing "with malice," and malice is not a "single" element, but encompasses three alternative states of mind, plus the *absence* of a tremendously broad range of circumstances–all of those that constitute justification, excuse, and mitigation. And yet the prosecutor has no burden of proof on justification, excuse, or mitigation unless they are factually present in the case. These complexities and difficulties can be worked through by a proper understanding of the two

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[104] *Schmuck v United States*, 489 US 705, 109 S Ct 1443, 103 L Ed 2d 734 (1989).

[105] *Stevenson v United States*, 162 US 313, 16 S Ct 839, 40 L Ed 980 (1896).

[106] See e.g. *United States v Hansen-Sturm*, 44 F3d 793, 794-795 (CA 9, 1995)(involuntary manslaughter a "subset" of the elements of murder); *United States v Browner*, 889 F2d 549 (CA 5, 1989); *United States v Begay*, 833 F2d 900 (CA 10, 1987); *United States v Eagle* Elk, 711 F2d 80 (CA 8, 1983); *United States v Anderson*, 201 F3d 1145 (CA 9, 2000)(voluntary and involuntary manslaughter are lesser included offenses of murder); *United States v Quintero*, 21 F3d 885 (CA 9, 1994).

[107] See e.g. *State v Keffer*, 860 P2d 1118 (Wyoming, 1993).

offenses in their historical context, and by deconstructing "malice," the accomplishment of which reveals that in fact manslaughter as an included offense of murder is probably the *original* included offense, and is a subset of the elements of murder.[108]

Judge Moylan has nicely described the conceptual difficulties created by the historical development of the crime of manslaughter, and the broad meaning of "malice":

> The unusual way in which manslaughter evolved has produced a tricky conceptual problem in picturing the relationship between murder and manslaughter....The unusual twist is that only a few limited and specific sets of circumstances qualify as recognized forms of mitigation. Whatever fails to so qualify remains part of the undifferentiated, unmitigated residue of murder. Thus, it is the lesser crime of manslaughter that is specific. Whatever is left over is the greater and generic crime of murder.....Murder, therefore, has come to be defined, in part at lest, in negative terms–as a killing without mitigation.[109]

This description of murder in negative terms has caused conceptual confusion of the type exhibited in *Van Wyck*, with some courts referring to mitigation/reasonable provocation as an "element" of voluntary manslaughter.[110] Deconstructing "malice" resolves the difficulty.

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[108] 3 Sir James F. Stephen, *A History of the Criminal Law of England* (London: 1883), p, 78-79; see also Adelstein, "Conflict of the Criminal Statute of Limitations With Lesser Offenses At Trial," 37 Williamd and Mary L Rev 199, fn 287 (1995).

[109] Moylan, "A Brief History of Criminal Homicide and Its Exponential Proliferation," MD-CLE 11 (2002).

[110] "The *elements* of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." See e.g. *People v Elkhoja*, 251 Mich App 417, 424 (2002).

This court has, in a sense, already deconstructed "malice" by directing that the term not be used in jury instructions.[111] Instead, the jury is instructed on the three alternative states of mind that prove murder, and instructed on justification – self-defense and the like – and mitigation *only* when some evidence raises them in the case. Put another way, homicide is either 1)justifiable or excusable;[112] 2)manslaughter; 3)second-degree murder, or; 4)first-degree murder. To "ascend the ladder of culpability"[113] the prosecution must show, in addition to showing one of the three alternative "states of mind":

- lack of justification or excuse, to show that the homicide is criminal;
- lack of mitigation, to show that the homicide is not manslaughter;
- premeditation and deliberation, or during the course of an enumerated felony, to show that the degree is first-degree murder.

As Judge Moylan has cogently observed, "only the final probandum" in the ladder of culpability involves an affirmative element; the others are "negative elements." Negative elements create a practical problem: "[b]ecause such notions as justification, excuse, and mitigation are not monolithic phenomena but come rather in infinite variety, anticipatory disproof of them in the abstract becomes a practical impossibility."[114] The law does not resolve this practical problem by

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[111] *People v Woods*, 416 Mich 581 (1982).

[112] Historically, justification and excuse were different, but for purposes here no point is served in tarrying over the roots of that difference and its eventual virtual extinguishment.

[113] *Gilbert v State*, 373 A2d 311, 314 (1977).

[114] *Gilbert*, at 314.

making mitigation an affirmative element of manslaughter, but instead provides relief through the device of a rebuttable evidentiary presumption.

The evidentiary presumption, because of constitutional difficulties, has become an outcast in the criminal law, but has an appropriate – indeed, a necessary – function here, one that is quite constitutional when malice is viewed in its deconstructed form. It is clear that it is impermissible to "presume" or "imply" malice from the use of a deadly weapon, or from the fact of a killing, even an unjustified one,[115] but this is because of the umbrella nature of malice. To say the law "presumes malice" in certain circumstances is to say that the law presumes also the *necessary state of mind*, because the criminal state of mind, in one of its alternative forms, at least, is a part of the concept of malice, but the necessary state of mind can only permissibly be *inferred* from the circumstances of the killing. But the law always has, still does, and permissibly *can* presume that where the killing is proven to have occurred with one of the alternative states of mind, it occurred without justification, excuse, or mitigation; the "negative elements" are presumed, unless some evidence in the case suggests the contrary. In no place in the country does the prosecution carry an evidentiary burden to prove the "negative elements" of murder specifically where there is no evidence in the case raising them; without that evidence, the evidence showing the defendant killed with one of the alternative criminal states of mind is sufficient to carry the state's burden. The presumption is, of course, by definition rebuttable, and of the "bursting bubble" type advocated by Professor Thayer, for when any evidence of mitigation (or justification) is presented in the case the presumption disappears, and the prosecution then must

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[115] See e.g. *People v Richardson*, 409 Mich 126 (1980).

specifically carry the burden of disproving the particular evidentiary sort of mitigation or justification raised.[116]

A federal case is particularly lucid on the point. One Lopez Quintero was charged with the first-degree murder of his two-year-old daughter, and the jury was instructed, after the granting of a directed verdict on the first-degree murder charge, on murder in the second degree, voluntary manslaughter, and involuntary manslaughter. Quintero was convicted of voluntary manslaughter, and argued on appeal that because the jury had acquitted him of murder, and because, he alleged, there was no evidence of heat of passion or provocation, the evidence was therefore insufficient to show voluntary manslaughter, an acquittal was required. The court disagreed.[117]

Quintero's argument necessarily turned on his contention that the prosecution had the burden to prove adequate provocation – that adequate provocation is an element of the crime of voluntary manslaughter. This the court rejected. Recognizing that, to be an included offense of murder, manslaughter must be a subset of the elements of murder, the court explained that manslaughter is distinguished from murder by the absence of malice, one of the essential elements of murder; malice in this context is not "made absent" by a failure to find the required mental state, but by the failure to negate, where evidence suggests it, mitigation of the offense to manslaughter:

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[116] Of course, the fact-finder may disbelieve the evidence of mitigation or justification and still convict, in that the remaining evidence still allows the inference of guilt, so that the evidence is enough "to get the defense before the jury," but the "fact that it may not be believed is enough to keep the State's case before the jury." *Gilbert*, at 318.

[117] *United States v Quintero*, 21 F3d 885 (CA 9, 1994).

> When a defendant charged with murder introduces evidence of sudden quarrel or heat of passion, the evidence acts in the nature of a defense to the murder charge....The defendant attempts to negate the malice element by claiming, in essence, that she was not acting maliciously because some extreme provocation, beyond what a reasonable person could be expected to withstand, severely impaired her capacity for self-control in committing the killing.
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> *****
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> It is *not*, however, the burden of the government to also prove the *presence* of sudden quarrel or heat of passion before a conviction for voluntary manslaughter can stand in a murder trial.[118]

Voluntary manslaughter is thus a necessarily-included offense of murder, and under *Cornell* whether an instruction on request should be given turns on a rational view of the evidence.

(b) Involuntary manslaughter

Involuntary manslaughter is also included within the crime of murder, as a subset of the elements of murder, though again the matter is not without some conceptual difficulty (though historically it has always been so recognized, at least until the creation in Michigan of cognate-included offenses). At the common law, there was originally no distinction between the offenses of voluntary manslaughter and involuntary manslaughter, once the offense of manslaughter was itself recognized so as to ameliorate, in some circumstances, the harsh consequences of the charge of murder.[119] Just as voluntary manslaughter is an included offense of murder on a "subset" analysis, so is involuntary manslaughter, although at first blush this conclusion may be

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[118] 21 F3d at 889-890 (emphasis in the original) See also, for example, *State v Keffer*, 860 P2d 1118, 1137 (Wyo, 1993) (...the elements of manslaughter do represent a subset of the elements of the offense of second-degree murder").

[119] LaFave and Scott, *Substantive Criminal Law*, § 7.12.

"less than obvious."[120] Malice is negated for voluntary manslaughter not by negating the mental state required for murder, but by, in a sense, excusing it because of a provocation recognized as adequate under the law to mitigate the crime; malice is negated for involuntary manslaughter, on the other hand, not by mitigating that which otherwise is a second-degree murder given proof of the mental element of the offense to a lower offense, but because the mental state itself for second-degree murder is found wanting:

> ...the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to meet the traditional malice requirements....the requisite mental state is reduced to "gross" or "criminal" negligence ...[that] falls short of that most extreme recklessness and wantonness required for "depraved heart" malice.
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> *****
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> Thus, involuntary manslaughter...differs from murder only in that it requires a reduced level of culpability in committing the same physical act. As a matter of black letter law, that is sufficient to make it a lesser included offense....As such, federal courts *regularly submit involuntary manslaughter to juries as a lesser included offense of murder.*[121]

Put another way, involuntary manslaughter is a lesser-included offense of murder because gross negligence is a lesser degree of culpability than "wanton and willful" disregard, the third alternative mental state sufficient to prove murder.

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[120] *United States v Browner*, 889 F2d 549, 552 (CA 5, 1989).

[121] 889 F2d at 553 (emphasis supplied). See also *United States v Brown*, 287 F3d 965, 974 (CA 10, 2002) ("Mr. Brown easily satisfied the first two elements of the lesser included ofense inquiry. First he made a proper request....Second, involuntary manslaughter is a lesser included offense of second degree murder...."); *United States v Anderson*, 201 F3d 1145, 1148 (CA 9, 2000) ("Voluntary and involuntary manslaughter are lesser included offenses of murder").

The chart below is another way of expressing the elements of murder and the two forms of manslaughter, to demonstrate that each is an included offense of murder on a subset of elements analysis:

ELEMENTS OF MURDER[122]	**ELEMENTS OF VOLUNTARY MANSLAUGHTER**[123]	**ELEMENTS OF INVOLUNTARY MANSLAUGHTER**[124]
A death	A death	A death
caused by an act of the defendant	caused by an act of the defendant	caused by an act of the defendant
with either 1)intent to kill, or 2)intent to do great bodily harm, or 3)wanton and willful disregard of the likelihood that the natural tendency of his/her conduct is to cause death or great bodily harm, and	with either 1)intent to kill, or 2)intent to do great bodily harm, or 3)wanton and willful disregard of the likelihood that the natural tendency of his/her conduct is to cause death or great bodily harm, and	with gross negligence; that is, with wanton and willful disregard of the possibility that his/her conduct will cause death or great bodily harm.
without justification, excuse, or mitigation.	without justification or excuse.	

[122] *People v Goecke*, 457 Mich 442, 464 (1998). And see CJI2d 16.5.

[123] It is frequently said in Michigan cases that "The *elements* of voluntary manslaughter are (1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." See e.g. *People v Elkhoja*, 251 Mich App 417, 424 (2002). But these are not the "elements" of the crime of voluntary manslaughter at all, and would it clarify the jurisprudence of the State were they not so called; what is actually described are those circumstances that mitigate an otherwise malicious killing to a lesser degree of culpability. They are not elements, because the prosecutor, to prove voluntary manslaughter, does not have to prove that the killing was mitigated by adequate provocation. See *People v Darden*, 230 Mich App 597 (1998); *People v Doss*, 406 Mich 90 (1979). For an accurate statement of the elements of voluntary manslaughter, see e.g. *People v Pouncey*, 437 Mich 382 (1991). See also CJI2d 16.9; 16.9.

[124] See *People v Djordevic*, 230 Mich App 459, 462 (1998); see also *United States v Brown*, 287 F3d 965 (CA 10, 2002). And see CJI2d 16.10.

B. Consequences

The former rule that instruction on a "necessarily"-included offense was required without regard to the state of the evidence that contributed to the aberration of *Van Wyck* has caused the same difficulty with regard to other offenses; the court needs to make plain the error of the sort of analysis undertaken in that case. For example, while it is clear that felonious assault is not an included offense of assault with intent to murder, the former offense requiring proof of use of a dangerous weapon, an element not contained in the latter, on a subset of elements analysis the offense of assault with intent to do great bodily harm *is* a lesser-included offense of assault with intent to murder, for just as gross negligence is a lesser mental state than wanton and willful disregard, so the intent to do great bodily harm is a lesser mental state than the intent to take life. Yet, though addressed only in unpublished decisions, the Court of Appeals has said that "Assault with intent to do great bodily harm is a cognate lesser offense of assault with intent to murder."[125] It must be made plain that a lesser mental state is included within a greater. Similarly, in published opinions the Court of Appeals has held that a lesser-drug-amount offense is not necessarily included within a greater-drug-amount offense.[126] While understandable to avoid the absurd result of giving lesser-drug-amount offense instructions when there is no evidence of anything less than the charged amount, as a matter of subset analysis it is incorrect – a lesser amount is plainly included within a greater amount – and the absurdity of a required instruction

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[125] *People v. Norwood,* 2001 WL 703961 (3-20-2001).

[126] *People v Marji,* 180 Mich App 525, 531 (1989).

on the lesser where unsupported by any evidence has been obviated by *Cornell*. It is time to start calling things by their right names, and this court needs to make clear the proper approach to a subset of elements analysis.

C. The Evidence Here Did Not Support An Instruction on Involuntary Manslaughter: Accident is a Perfect Defense, and Not Every Claim of Accident Supports A Finding of Gross Negligence

The duty of the trial judge to instruct on lesser included offenses is determined by the evidence.[127] If evidence has been presented which would support a conviction of a lesser included offense – one which is a subset of the elements of the charged offense – refusal to give a requested instruction is error.[128] But if no reasonable jury could find a lesser offense because of the absence of evidence, then the trial judge should not give the requested instruction.[129] Defendant must do more than invite the jury to speculate.[130] There must be more than a modicum of evidence; there must be sufficient evidence that defendant could be convicted of the lesser offense. Only then does the judge's failure to instruct on the lesser included offense constitute error.[131]

Involuntary manslaughter is in some senses a "catch-all" offense, including all manslaughter not characterized as voluntary manslaughter. An unintentional killing of a human

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[127] *People v Phillips*, 385 Mich 30 (1971).

[128] *People v Mosko*, 441 Mich 496 (1992).

[129] This is a question of law which this Court reviews de novo. *People v Hubbard* (After Remand), 217 Mich App 459, 487 (1996).

[130] *People v Bailey*, 451 Mich 657 (1996).

[131] *People v Pouncey*, 437 Mich 382, 387 (1991).

being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse, or not criminal because, outside of homicide by motor vehicle, not caused by more than ordinary negligence. Thus, at common law, where the loss of life has been neither intended nor the result of any other sort of person-endangering-state-of-mind, the killing will be excused if he who caused it was not engaged in any unlawful activity at the time and was free from negligence.[132] Involuntary manslaughter ordinarily occurs when the death results from an act not intended to produce serious bodily harm or when the death results from gross criminal negligence.[133]

The Court of Appeals ruled an involuntary manslaughter instruction was supported by the evidence in that the jury, based only on Defendant's written statement to police, could have believed that when Defendant was struggling with Thurman Chillers, Chiller's gun accidentally discharged and killed William Stockdale. But Defendant's statement stated that "the frail guy" (Chillers) *pulled the trigger*, not that the gun went off accidentally.[134] Nor is there any claim by the defendant that he acted with gross negligence in any fashion so as to cause Stockdale's death. His claim of accident was to exculpate totally, not to demonstrate that the crime was manslaughter, not murder. There is thus no evidentiary support for an involuntary manslaughter instruction even under Defendant's theory of events.

An unlawful act committed with intent to injure or in a grossly negligent manner

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[132] *People v Datema*, 448 Mich 585, 595 (1995).

[133] *People v Djordevic*, 230 Mich App 459, 462 (1998).

[134] 126a-132a..

proximately causing death constitutes involuntary manslaughter.[135] The usual situations in which involuntary manslaughter arise are either when death results from a direct act not intended to produce serious bodily harm,[136] or when death results from criminal negligence.[137]

The Court of Appeals' decision that an instruction on involuntary manslaughter was appropriate was *completely* based on Defendant's statement to police.[138] Defendant's statement, entered into evidence, read in pertinent part as follows:

> I was at a gas station on Seven Mile near Hoover when Ivan pulled-up in a grey newer model car and asked me did I want some bud. Ivan asked me did I have half on it. I said, yes. I then got into the car with Ivan. Ivan stopped by one house, then he went to the bud house. When we got to the house, Ivan stayed in the car and I went up to the house. When I got to the front door, there was a big guy coming out and he motioned for me just to go on in. The guy that let me in continued talking to a big dark-skinned guy with a deep voice. Another guy, kind of frail, sitting in a love seat asked me how many I needed. I responded by saying, just one back. That's when Ivan came to the door. Ivan started talking to the guy with the deep voice. The guy that let me in then left. I started to get my stuff from the frail guy. While I'm getting my stuff, I heard some tussling. I look back and Ivan was tussling with the big guy with the deep voice. They were tussling over a handgun with a dark barrel. While they were tussling, I heard approximately two shots. They then fell into a corner over a chair. I then heard the frail guy holler. He had pulled out a shiny revolver and pointed it at Ivan and the guy he was tussling with. *I then tried to knock the gun away from the frail guy, he (frail guy) pulled the trigger.* I then tried to run but I tripped over Ivan or the guy he was

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[135] *People v Datema*, 448 Mich 585 (1995).

[136] *People v Carter*, 387 Mich 397, 419 (1972).

[137] *People v Townes,* 391 Mich 578, 590-591 (1974).

[138] "If the jury believed defendant's statement, which was admitted into evidence by the prosecutor, there was sufficient evidence to support an instruction under this theory." COA opinion, 3 (opinion is part of the People's Appendix).

> tussling with feet. I then got up and ran out the house and I started feeling pain and I hearing shots. I looked back and the shots are coming from a bedroom window. I then see Ivan coming out the house. By this time I was bent over and I grabbed and Ivan grabbed me and asked me was I all right. I told him no. I'm hurt. Ivan then helped me to the car and drove off. I don't remember too much after that.[139]

The Court of Appeals erroneously concluded from Defendant's statement that Defendant was entitled to an instruction based on an act of gross negligence. The Court ignored the fact that according to Defendant, he did not discharge the gun. Thurman Chillers (the frail guy) pulled the trigger and discharged the gun. Defendant cannot be held criminally liable for the act of Chillers, even under an aiding and abetting theory, because Chillers was not acting in concert with Defendant.[140] And no rational view of the evidence supports a theory that defendant's conduct was grossly negligent; either an accidental death occurred, or a murder.

Involuntary manslaughter might have been a proper instruction if Chillers' was on trial. But Defendant's version of events, if believed, shows that Defendant was guilty of *no crime,* not that he was guilty of involuntary manslaughter. Defendant's statement illustrated that he was acting in defense of another (specifically, defending Ivan Tims from Chillers) when Defendant tried to knock the firearm out of Chiller's hand. Trying to knock the gun out of Chillers' hand so that Chillers would not shoot Defendant's friend, Ivan Tims, is not a criminally negligent or unlawful act. It does not fit the definition of involuntary manslaughter, but is covered by the instruction on accident.

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[139] 126a-132a (emphasis supplied).

[140] The co-defendant was Ivan Tims. Tims conviction was recently upheld. *People v Ivan Tims*, unpublished COA no. 220271, October 9, 2001.

The Court of Appeals relied on two cases to support its conclusion that an involuntary manslaughter instruction was justified in this case. Both are completely factually distinguishable from the instant case so as to be inapplicable. In *People v Richardson*,[141] defendant testified in his own behalf. His theory was that the shooting had been accidental. He testified that he got into an argument with the deceased because the deceased had laughed at him. The argument escalated into cursing and pushing. When the deceased shoved defendant back towards the car, defendant pulled the gun out, butt end first. As he swung the rifle around the victim grabbed the barrel. The two men wrestled and the gun went off. The deceased fell to the ground still holding onto the gun. Defendant pulled the gun away, got back in the car and left. Defendant said he did not stop to check on the deceased's injuries because he did not believe he had been shot.[142]

Likewise in *People v Ora Jones*,[143] defendant testified that he took the shotgun from a closet and approached the kitchen with the intention of frightening his female companion from the apartment. He testified that he did not aim the weapon intentionally, that he did not know the weapon was loaded, and that the weapon accidentally discharged when he was bumped by the fleeing female companion. The Court held that under those facts an involuntary manslaughter instruction was appropriate.

What is common in both cases cited by the Court of Appeals is that defendant claimed that he possessed the gun, struggled with the victim, and the gun discharged accidently. Here, there is no allegation by Defendant that he ever held a gun. The only allegation made by

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[141] 409 Mich 126, 131-133 (1980).

[142] *Id.*

[143] 395 Mich 379, 384-385 (1975).

Defendant is that he acted to prevent Chillers from shooting his friend, Ivan Tims. Intrinsic in all criminal convictions is the understanding that in order to be criminally liable for an act, one must act. Indeed, the definition of involuntary manslaughter requires a criminally negligent act. Here, the only evidence that the Court of Appeals used to justify its decision that an instruction on involuntary manslaughter was required was Defendant's statement that contains no evidence of a criminally negligent act. Again, if defendant's statement is believed, he could not be held criminally liable for Chillers' act. Nor could the jury, without manufacturing evidence, come to the conclusion that Defendant was criminally negligent.

The instruction is also entirely inconsistent with the defense theory of the case. In opening statement, defense counsel pointed the finger at co-defendant Ivan Tims, stating that Ivan Tims shot William Stockdale unbeknownst to Defendant *while Defendant was sitting outside in the car.*[144] It was only in discussing jury instructions that defense counsel suddenly came to the conclusion that involuntary manslaughter was an appropriate charge. Counsel did not identify any evidence to support an involuntary manslaughter instruction:

> Mr. Cripps [defense attorney]: Alternatively, there's also involuntary manslaughter, now that I think about it, in terms of that gun potentially accidentally going off during the struggle over the gun at the time it's discharged. That's how I claim that the shot to the leg happened, when they're struggling over the gun. So perhaps my request might be better, now that I think about it, for involuntary manslaughter.
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> Ms. Carter [prosecutor]: Your Honor, if we're totally forgetting the voluntary manslaughter, then even if you walk into the involuntary manslaughter door you have to show gross negligence in involuntary manslaughter. You also have to take the whole statement as a whole. If you take the whole statement as a

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[144] 19a.

whole you don't hear Mr. Mendoza saying he's arguing. You don't – Mr. Mendoza is making a – according to Mr. Mendoza he's coolly making a drug deal here. And he overhears tussling. If you were to listen to Mr. Mendoza's statement he has absolutely no heated mind, and he's not admitting that there's any gross negligence. In his statement he's not even admitting he had a gun.

So when does the gross negligence come in that now all of a sudden we should give Mr. Mendoza a gun if we're suppose to use his statement to make out manslaughter? I don't think you can do that. Then if you go back to the statement that puts a gun in Mr. Mendoza's hand you'd have to listen to Thurman Chillers. And even then Thurman Chillers said Mr. Mendoza came in there, asked for the weed, goes out, comes back again. He has a gun. So at no point do we have tussling that involves Mr. Mendoza.

Then if you talk about gross negligence, which means wantonness or disregard of the consequences which may result or ensue in an indifference or reckless disregard to the rights of others, he's not said that. He's not running around there shooting into the room. He didn't come in there screaming and calling them names. He [sic He's] certainly not alleging that he was unhappy with the dope deal. So then there's absolutely nothing that would show any willful or wantonness in his actions, which would also mitigate this crime to involuntary manslaughter.

So I clearly don't think that there's anything in any testimony or even in his statement that would show gross negligence or wanton or wilfulness in his conduct.

Mr. Cripps: Judge, all we have to show is a colorable claim here in terms of the evidence that you heard in this trial. I think clearly there's enough for the Court to give this lesser base [sic, based] on what you heard in this trial[145]

This passage shows that Defendant gave the court nothing on which to base an involuntary manslaughter instruction.

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[145] 220a-222a.

Harmless Error

Even if it was error to fail to instruct on involuntary manslaughter, the error was harmless since there was overwhelming evidence that Defendant did not commit involuntary manslaughter. The murder weapon was found *in the trunk of Defendant's car*, which is antithetical to a theory of involuntary manslaughter (if Defendant's statement even supports that theory). Under MCL 769.26, no verdict shall be reversed or a new trial granted on the ground of misdirection of the jury unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear the error complained of has resulted in a miscarriage of justice.[146]

In this case, it is not more probable than not that the jury would have believed that Defendant's statement proved that he committed involuntary manslaughter in light of the undisputed physical evidence.[147] Under Defendant's scenario, the shooting would have occurred at close range. Yet, the medical examiner testified that there was no evidence of close-range firing, and the decedent was not wearing a shirt at the time he was shot so had there been close-range firing, stippling and soot would have been evident on decedent's chest.[148]

The prosecution's evidence showed that co-defendant entered the victim's home with a

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[146] "This Court has made it clear that harmless error analysis is applicable to instructional errors involving necessarily included offenses." *People v Cornell*, 466 Mich 335, 361 (2002).

[147] In the case of non-constitutional preserved error, Defendant must show that it is more probable than not that the failure to give the requested lesser included instruction undermined reliability in the verdict. *People v Carines*, 460 Mich 750 (1999).

[148] 30a; 180a.

gun and was immediately ordered to shoot by Defendant.[149] Both Defendant and co-defendant were armed, and, following their arrest, two guns, a 9mm and a revolver, were found in the trunk of their car underneath a baby stroller. Ballistics established that both guns were fired. The bullet recovered from the decedent's body matched the revolver found in defendant's trunk, and spent casings at the scene matched the 9mm also found in Defendant's trunk.[150] Thus, although no eyewitnesses were left alive to testify as to which Defendant fired the bullet that ultimately killed the decedent, it is clear that both Defendants entered the decedent's home and immediately began firing weapons, and not that Defendant committed involuntary manslaughter. Therefore, the failure to instruct on involuntary manslaughter was harmless beyond a reasonable doubt.

Conclusion

Under the circumstances, a jury instruction on involuntary manslaughter was not justified. The Court of Appeals palpably erred by ruling that an involuntary manslaughter instruction was required.

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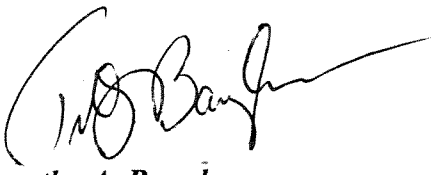
[149] 46a.

[150] 69a; 199a; 167a; 190a-197a.

RELIEF REQUESTED

WHEREFORE, this Honorable Court should reverse the opinion of the Court of Appeals which held that Defendant was entitled to an instruction on involuntary manslaughter.

MICHAEL E. DUGGAN
Wayne County Prosecuting Attorney



Timothy A. Baughman
Chief of Research, Training, & Appeals

Deborah K. Blair (P49663)
Assistant Prosecuting Attorney
1204 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: 313-833-2888

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